Supreme Court, U.S.
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90-1380

In The
Supreme Court Of The United States

CITY OF AUSTIN, TEXAS,
Petitioner

v.

JOLEEWU, LTD.,
Respondent

Appendix

Respectfully Submitted,

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

JOLEEWU, LTD.,	)(	
	)(	
Plaintiff,	)(	
	)(	
v.	)(	CIVIL NO.
	)(	A-89-CA-627
CITY OF AUSTIN,	)(	
	)(	
Defendant.	)(	

ORDER

Came on this day to be considered Motion to Dismiss or in the alternative, for Summary Judgment of the City of Austin. After careful consideration, the Court is of the opinion that this motion is

meritorious and should be granted.

I. Background

This case involves a piece of land owned by the Plaintiff, Joleewu, Ltd., condemned by Defendant, the City of Austin, for the construction of roadway improvements, drainage improvements to an adjacent creek, and public utilities. The Defendant filed its Original Petition for Condemnation seeking condemnation of a portion of Plaintiff's land on July 28, 1988, in Probate Court No. 1 in Travis County, Texas. In November 1988, the commissioners, appointed in accordance with Texas law, issued their award of $169,000.00 to the Plaintiff for the land

condemned by the city. This suit was originally filed by the Plaintiff in state district court in early 1988 prior to the condemnation proceeding. Defendant removed the case to this Court in July 1989.

II. Parties' Contentions

A. Plaintiff's Contentions

Plaintiff alleges that from approximately June 1987 to January 1988, Defendant represented to the Plaintiff that temporary and permanent easements on certain portions of Plaintiff's property would be required for roadway and drainage improvements along an adjacent creek and for the utility work to

be conducted in connection therewith. Plaintiff alleges that the Defendant represented that the plans for such improvements were complete and an immediate necessity for acquisition of the easements existed. Further, Plaintiff alleges these representations as to the necessity for immediate access to easements and their immediate purchase or condemnation were false and made with actual awareness of their falsity or with reckless disregard.

Plaintiff's alleged damages resulted from lost rental income for approximately a year from 14 mobile home pad sites situated on the land

condemned. Rentals were allegedly lost because the city moved the tenants one year before the land was actually condemned. Plaintiff also seeks exemplary damages and attorney's fees.

In its amended complaint, Plaintiff alleges the following six causes of action:

1. That Defendant's condemnation of its land constitutes a taking without compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Sections 17 and 19 of Article 1 of the Texas Constitution;

2. That Defendant's acts were

fraudulent in violation of Section 27.01 of the Texas Business Commerce Code;

3. That Defendant's acts constitute breach of contract;

4. That Defendant denied the Plaintiff "the rights secured to it by the Fifth and Fourteenth Amendments of the United States Constitution pursuant to established state procedure;"

5. That Plaintiff is entitled to recover from Defendant based on the doctrine of promissory estoppel; and

6. That Plaintiff is entitled to recover exemplary damages.

B. Defendant's Contentions

Defendant contends that it did not

deny Plaintiff the benefit and enjoyment of the property prior to the condemnation award which was deposited into the registry of the court on November 15, 1988.

III. Grounds for Dismissal

The party bringing a motion to dismiss under Rule 12(b)(6) bears the burden of demonstrating that no claim has been stated upon which relief can be granted. Sherrell v. City of Longview, 683 F. Supp. 1108, 1110 (E.D. Tex. 1988); 2A Moore's Federal Practice, para. 12.07[2.-5.]. A pleading should not be dismissed for failure to state a claim unless it appears beyond doubt that the pleader can prove no set of facts in

support of the claim which would entitle him or her to relief. Conley v. Gibson, 355 U.S. 41 (1957). Even if it appears on the face of the pleadings that recovery is very remote and unlikely, that is not the test, because in passing on a motion to dismiss, the allegations of the complaint should be construed favorably to the pleader. Scheuer v Rhodes, 426 U. S. 232 (1974); Haines v. Kerner, 404 U. S. 519, 520 (1972), reh. denied 405 U.S. 948.

Motions to dismiss under Rule 12 (b) (6) are not favored and are granted sparingly. Rios v. Dillman, 499 F. 2d 329 (5th Cir. 1974). A complaint upon which relief may be granted need only outline a

recognized legal or equitable claim which sufficiently pinpoints the time, place, and circumstances of the alleged occurrence and which, if later proven to the required legal degree, will justify some form of relief. Dorothy K. Winston & Co. v. Town Heights Development, Inc., 376 F. Supp. 1214 (D.D.C. 1974).

If material outside the pleadings are considered in ruling on a 12(b)(6) motion, the motion is considered as being for summary judgment. Fed. R. Civ. P. 56; see, e.g. Romero v. International Terminal Operating Co., 358 U.S 354 (1958), reh. denied, 359 U.S. 926. Consideration of matters outside the

pleadings is within the discretion of the court. See Sterans v. Veterans of Foreign Wars, 500 F. 2d 788 (D.C. Cir. 1974), on remand, 394 F. Supp. 599 (D.D.C.), aff'd 527 F. 2d 1387, cert. denied 429 U.S. 822.

A. No Evidence to Support a Taking

Defendant moves to dismiss all of Plaintiff's claims arising under Sections 17 and 19 of Article 1 of the Texas Constitution and under the Fifth and Fourteenth Amendments of the United States Constitution. Defendant argues that there is no evidence to support a taking, damaging or destroying of Plaintiff's land between November 1, 1987

until November 4, 1988. Defendant's principle contention is that it did not expel tenants from the portion of land to be acquired at any time prior to November 15, 1988. Defendant asserts it was acting according to federal law in advising tenants of the upcoming condemnation and in assisting them in their relocation. Plaintiff simply responds that Defendant cannot "offer summary judgment evidence to establish that it did not expel the tenants from the Plaintiff's land." Plaintiff's Response at 7.

A "taking" of land within the concept of Section 17, Article 1 of the Texas Constitution is an actual physical

invasion or an appropriation of the property. Hubler v. City of Corpus Christi, 564 S. W. 2d 816, 820 (Tex. Civ. App.--Corpus Christi 1978). In certain instances, acts short of actual physical invasion, appropriation or occupation can amount to a compensable taking where governmental agencies conducting public works projects have unreasonably interfered with the land owner's access to his property or have otherwise imposed restrictions that constitute an unreasonable interference with the land owner's right to use and enjoy his property. Id.; see Pennsylvania Coal Company v. Mahon, 260 U.S. 393 (1922);

Dupuy v. City of Waco, 396 S.W. 103 (Tex. 1965).

The general rule is that announcement of a projected public improvement, together with preparation of plans and maps showing the property in question as within the limits of the project, without any actual interference with the owner's use, does not constitute a taking or compensable damaging, even though it may reduce marketability as a practical matter. Thurow v. City of Dallas, 499 S.W. 2d 347, 348 (Tex. Civ. App.--Dallas 1973, writ ref'd n.r.e.); see also Gully v. Southwestern Bell Telephone Co., 774 F.2d 1287, 1292 (5th Cir. 1985). In

extraordinary circumstances an equivocal manifestation of intention to take the property, followed by work on the project or other action which actually interferes with owner's use and enjoyment, may establish a taking or damaging requiring determination of the value at an earlier date. Thurow, 499 S.W. 2d at 348. Plaintiff would argue that this case is one in which extraordinary circumstances exists because of Defendant's relocation of tenants. However, the mere fact that tenants learn of contemplated condemnation and because of such information elect to vacate the property does not afford the

owner the right to recover damages from the state because there has been neither a taking or any character of a physical invasion of the property. State v. Vaughan, 319 S.W.2d 349, 354 (Tex. Civ. App.--Austin 1959, no writ). "The loss of tenants and the resulting loss of rental . . . [is] incidental or consequential to the taking of the entire property . . . [and] the state is not liable for such consequential damage." Id. at 354-55.

The extent of Defendant's interference in the use of Plaintiff's land prior to the condemnation award is unclear. Defendant argues that it was only doing what was required of it by

federal law. The law which Defendant cites as authority is as follow:

> Notice of relocation eligibility: Eligibility for relocation assistance shall begin on the date of initiation of negotiations (defined in Section 24.2(k)) for the occupied property. When this occurs, the Agency (the Federal Agency, State, or State Agency which acquires real property or displaces a person) shall promptly notify all occupants in writing of their eligibility for applicable relocation assistance.

Federal Register, Vol. 52, No. 242, Pg. 48003, under Relocation Notices, Section 24.203[4](b) (emphasis added). The regulation does not require the state

agency to actually relocate occupants of the condemned property as Defendant asserts. Therefore, if Plaintiff can show that the Defendant's removal was unauthorized and substantially interfered with its use of the property, Plaintiff maybe entitled to damages. Accordingly, this ground of dismissal will be denied.

B. Plaintiff's Claims of a Taking without Just Compensation are Barred by Res Judicata

Defendant asserts that the Plaintiff has been totally compensated for the portion acquired in a prior lawsuit, and all claims should be barred by the doctrine of res judicata. The prior

lawsuit to which Defendant refers is the condemnation proceeding it filed in July 1988. In the prior proceeding, the special commissioners entered an award in the amount of $169,000.00 for the land acquired on November 15, 1988. No objections were filed by the Plaintiff complaining of the award; and therefore, Defendant contends, Plaintiff has waived its right to raise the issue of damages in this case.

Plaintiff argues that it has neither requested any recovery for the value of easements taken nor damages to the remainder in this case. Rather, all damages sought by the Plaintiff herein

are for damages which resulted prior to the taking of the easement by condemnation.

"Res judicata is frequently characterized as claim preclusion because it bars litigation of all issues connected with a cause of action or defense which, with the use of diligence, might have been tried in the prior suit. Bonniwell v. Beech Aircraft Corporation, 663 S.W.2d 816,818 (Tex. 1984), citing Russell v. Moeling, 526 S.W. 2d 533 (Tex. 1975). When a prior judgment is offered in a subsequent suit in which there is identity of parties, issues and subject matter, such judgment is treated as an

absolute bar to retrial of claims pertaining to the same cause of action on the theory that they have merged into the judgment. Id. The rule of res judicata in Texas bars litigation of all issues connected with a cause of action or defense which, with the use of diligence, might have been tried in a former action as well as those which were actually tried. Ogletree v. Crates, 363 S.W.2d 431 (Tex. 1963); Stewart v. City of Austin, 744 S.W.2d 682, 685 (Tex. App.--Austin 1988, writ ref'd). A party cannot relitigate matters which he might have interposed, but failed to, in an action between the same parties or their privies in reference

to the same subject matter. Id.; Abbot Laboratories v. Gravis, 470 S.W.2d 639 (Tex. 1971).

Plaintiff argues that the Defendant is "required to prove that the prior suit involved the same issues, facts, and damages involved in this case." Plaintiff's Response at 9. "The excerpt of the transcript of the Commissioners' Hearing establishes the damages sought in the instant [sic] were clearly excluded from consideration in the condemnation proceeding." Id. at 9. Further, "Defendant has failed to offer any authority for the proposition that its later suit could affect claims that were already

subject of a suit at the time of the condemnation was filed." Id. Defendant argues, on the other hand, that "Plaintiff opted not to try his present claim for damages during the prior [condemnation] proceedings." Defendant's Motion at 10.

According to Texas statute Section 21.014(b), Tex. Prop. Code Ann., the commissioners' duty it to "assess damages fairly, impartially, and according to the law." Where condemnation of property is sought by a party having the power of eminent domain, all questions that may arise in such proceedings, must and should be

determined in condemnation proceedings, such as . . . the amount of damages . . . for the reason that in all such cases the statutes regulating the condemnation of property apply and must therefore control. Benat v. Dallas County, 266 S.W. 539, 541 (Tex. Civ. App.--Dallas, 1924, no writ). A landowner in condemnation proceedings may raise any issue challenging the legality of a proposed taking. Jones v. Missouri-Kansas Texas R. Co. of Texas, 14 S.W. 2d 357 (Tex. Civ. App.--Dallas 1929), aff'd 24 S.W. 2d 366 (Tex. Comm'n App. 1930). Once damages are assessed for the condemned land, the party whose

land is taken may object to the finding. Tex. Prop. Code Ann. Section 21.018(a) (Vernon 1984). Once the commissioners appointed in a condemnation proceeding fix the value of a parcel of land, all interested parties are bound by the commissioner's report unless they object to the award. United States v. 16,572 Acres of Land, 49 F.Supp 555 (D.C. Tex. 1943); see also State v. Nelson, 334 S.W.2d 788 (Tex. 1960); Day v. Wooten, 545 S.W.2d 16 (Tex. Civ. App.--Dallas 1976, writ ref'd n.r.e.).

All the necessary elements of res judicata have been proven. The identities of the parties are the same as well as the

issues and the subject matter. The condemnation proceeding was instigated by the city to determine the amount of damages owed to the Plaintiff. Most of Plaintiff's claims in this suit also seek a determination of the amount of damages due to Plaintiff for the land taken. Plaintiff is seeking lost rental income which allegedly resulted from the Defendant's intention to condemn the land. Lost rental income may have been relevant to the commissioner's determination of damages.

Plaintiff argues that certain issues of damages were excluded from consideration at the commissioner's

hearing, and therefore cannot be barred in this suit. True, the City Attorney present at the hearing informed the commissioners of the pending lawsuit and recommended that all issues addressed in that hearing be excluded from consideration. See Commissioners' Hearing Transcript at 139-40. Yet, Plaintiff failed to object at the hearing or timely file objections to the award. The purpose of the commissioners' hearing was to determine the amount of damages owing to the Plaintiff, and once the time for filing objections passed, the award became final. If Plaintiff had objected to the award, it would have been able to

present all issues effecting the value of the land, including lost rental income, to the county court. See Glade v. Dietert, 295 S.W. 2d 642, 646 (Tex. 1956). Therefore, Plaintiff's claims of taking without compensation or due process in violation of Fifth and Fourteenth Amendments to the United States Constitution, as well as in violation of Sections 17 and 19, Article 1 of the Texas Constitution are barred by the doctrine of res judicata and will be dismissed.

C. Defendant is Immune from Liability for Fraud

Defendant moves this Court to

dismiss Plaintiff's claim for fraud in a real estate transaction pursuant to Section 27.01 of the Texas Business and Commerce Code based on the doctrine of governmental immunity. Plaintiff argues that governmental immunity is not available where the conduct of such government amounts to a taking in violation of the Texas Constitution. Defendant does not dispute that immunity will not bar liability on the issue of taking, but rather asserts immunity from the fraud cause of action only.

Acquiring an interest in land for roadway and drainage improvements involves a governmental function. Tex.

Civ. Prac. & Rem. Code, Section 101.021 (Vernon 1990); see also Tex. Civ. Prac. & Rem. Code, Section 101.021 (Vernon 1986). Therefore, the Defendant is immune from liablity for fraud and this cause of action for fraud will be dismissed.

D. Defendant Cannot Enter into a Contract in Derogation of the Municipality's Governmental Function.

Defendant argues that Plaintiff's claim for breach of contract to conduct immediate negotiations for the acquisition of the easements or to immediately condemn such easements should be dismissed because such a

contract would be unenforceable. In response, Plaintiff simply states,"[t]he contract alleged by the Plaintiff was not one by which the Defendant agreed to forgo [sic] a statutory duty or to refrain from exercising its governmental powers, as is the situation in the cases cited [by the Defendant]." Plaintiff's Response at 14. "The Defendant agreed that if the Plaintiff would allow tenants to be moved from the land the Defendant would acquire the land." Plaintiff's Response at 14.

A contract in derogation of the municipality's governmental function is unenforceable. City of Farmer's Branch

v. City of Addision, 694 S.W. 2d 94 (Tex. Civ. App.--Dallas 1985, writ ref'd n.r.e.). The city cannot, by contract or otherwise, surrender its governmental or legislative functions, nor can it legally enter into any contract which will embarrass or control its legislative powers and duties or which amount of an abdication of its governmental functions or its police power. Fidelity Land & Trust Co. of Texas v. City of West University Place, 496 S.W. 2d. 116 (Tex. Civ. App.--Houston 1973). Therefore, a claim for breach of contract for failure to immediately negotiate or condemn the easements in question cannot lie against the Defendant and will

be dismissed.

E. The Theory of Promissory Estoppel is Not Available

Plaintiff's claims for promissory estoppel is based on its allegations that the Defendant represented that there was a need for immediate acquisition of the easements in question, and that condemnation was imminent. Defendant urges dismissal of this claim based on the unavailability of the theory of promissory estoppel to enforce a governmental act.

The theory of estoppel cannot be used to force a govermental entity into performing a govermental function in a certain way. International Bank of

Commerce of Laredo, 635 S.W. 2d 539 (Tex. Civ. App.--San Antonio 1983, writ ref'd n.r.e.). When a governmental unit is exercising governmental powers it is not subject to estoppel. Leeco Gas & Oil Co. v. Nueces County, 736 S.W.2d 629, 633 (Tex. 1987). Therefore, the cause of action for promissory estoppel is not an available theory to force a city to perform a governmental function, and this cause of action brought against the Defendant will be dismissed.

Accordingly,

IT IS ORDERED that Defendant's Motion to Dismiss is GRANTED and all claims against Defendant be DISMISSED.

SIGNED this 10th day of January 1990.

WALTER S. SMITH, JR
(signature)

UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JOLEEWU, LTD.	JUDGMENT IN A CIVIL CASE
V.	
CITY OF AUSTIN	CASE NO. A-89-CA-627

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered it verdict.

_X_ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendant's Motion to Dismiss is GRANTED and all claims against Defendant be DISMISSED.

Costs assessed against Plaintiff and in favor of Defendant.

CHARLES W. VAGNER
Clerk

January 11, 1990
Date

/s/ Kim Kruemche
(By) Deputy Clerk

JOLEEWU, LTD. v. CITY OF AUSTIN

JOLEEWU, LTD., Plaintiff-Appellant,

v.

CITY OF AUSTIN, Defendant-Appellee.

No. 90-8149

United States Court of Appeals,

Fifth Circuit

Nov. 1, 1990.

Mobile home park owner filed suit against Texas city, seeking damages for inverse condemnation, fraud, breach of contract, and promissory estoppel. Following removal, the United States District Court for the Western District of Texas, Walter S. Smith, Jr., J., granted city's motion to dismiss. On appeal, the Court of Appeals, Edith H. Jones, Circuit Judge, held that under Texas law: (1) city

was equitably estopped to assert res judicata defense to inverse condemnation claim by virtue of representations made to special commissioners; (2) city was immune from liability for fraud in connection with acquisition of land for public improvements, a governmental rather than proprietary function; and (3) any contract between city and landowner purporting to dictate when city had to initiate condemnation proceedings was unenforceable.

Affirmed in part, and reversed in part.

1. Judgment - key no. 619, 713(2), 720

Under Texas law of res judicata, judgment in first suit precludes second action by parties and their privies not only on matters actually litigated but also on causes of action or defenses which arise

out of the same subject matter and which might have been litigated in the first suit.

2. Estoppel - key no. 68(2)

Under Texas law, one party must be estopped to assert legal position against another if that position is inconsistent with previous one.

3. Estoppel - key no. 62.4

Under Texas law, city was equitably estopped to assert res judicata defense to inverse condemnation claim, arising out of its delay in instituting condemnation proceedings, by virtue of its specific representation in proceedings before special commissioners in condemnation that parties would not be contesting precondemnation damages before their tribunal and that their award consequently would not include such

damages; property owner had not filed objections to award because it believed, relying on city's representations, that it would have opportunity to recover disputed damages in lawsuit and would lose opportunity to recover those damages if city were not so estopped.

4. Estoppel - key no. 62.4

Under Texas law, municipal or quasimunicipal corporation may be estopped where justice, honesty, and fair dealing require it.

5. Municipal Corporations - key no. 724

Under Texas law, city was immune from liability for alleged fraud in connection with acquisition of land for public improvements, a governmental rather than proprietary function. V.T.C.A., Civil Practice & Remedies

Code, Section 101.0215(a)(3, 9, 22, 32).

6. Municipal Corporations - key no. 247

Under Texas law, contract restricting city's freedom in choosing when to acquire property is in derogation of governmental function and is unenforceable.

Appeal from the United States District Court for the Western District of Texas.

Before JONES, DUHE and WIENER, Circuit Judges.

EDITH H. JONES, Circuit Judge:

Plaintiff-appellant Joleewu, Ltd. sued the City of Austin in the district court of Travis County, Texas seeking damages for inverse condemnation,

fraud, breach of contract, and promissory estoppel. The City removed the case to federal court and moved for dismissal of all claims under Fed.R.Civ.P. 12(b)(6). The United States District Court for the Western District of Texas granted the motion and dismissed Joleewu's complaint. We reverse and remand the dismissal of Joleewu's inverse condemnation claim but otherwise affirm the judgment of the district court. The treacherous trial tactics employed by the City have, as we explain later, disserved its sovereign responsibility to one of its citizens and to our courts.

I.
FACTS AND PROCEEDINGS BELOW

Because this case was dismissed on the pleadings, we recite the facts as

they appear in Joleewu's complaint. In April 1987, the City of Austin sought to obtain an easement over a portion of Joleewu's Bel-Air Mobile Home Park in order to construct roadway, drainage, and utility improvements. While the City was negotiating with Joleewu over the price to be paid for the easement, the City notified the 14 tenants living on the property that it would soon either purchase or condemn the land under their lots. By November, all of those tenants had abandoned their lots, most having relocated with the assistance of the City. Joleewu cooperated in the relocation, allegedly relying on the City's representations that it needed the easement immediately and that it would commence condemnation proceedings without delay. When, nearly four months later, the City had neither reached an

agreement with Joleewu nor initiated any formal proceedings to condemn the property, Joleewu filed suit against the City in the district court of Travis County, Texas. Joleewu's "inverse condemnation suit" alleged that the City had taken its property without just compensation in violation of article I, section 17, of the Texas Constitution.

While Joleewu's lawsuit languished in state court, the City at last commenced formal proceedings to condemn the subject property on July 28, 1988. Pursuant to Texas procedure, three special commissioners were appointed to determine the fair market value of the property taken. The commissioners took testimony about the property's value at a hearing in November 1988 and later that month awarded Joleewu $169,000 for the easement taken. Neither party filed

objections to the award, and it became final in January 1989. In July 1989, Joleewu amended its state court complaint to add a claim for inverse condemnation under the Just Compensation Clause of the United States Constitution. The company sought $24,640 in damages for lost rental income from the 14 mobile home spaces, plus attorney's fees. The federal constitutional question allowed the City to remove the case to federal district court. Removal paved the way for the Rule 12(b)(6) dismissal challenged by Joleewu.

II.
INVERSE CONDEMNATION CLAIM

The district court denied the City's motion to dismiss Joleewu's inverse condemnation damage claim based on

lack of evidence to prove a taking, but it granted the motion on the theory that the claim was barred by res judicata. The court held that Joleewu could have, or should have, asserted the claim in the condemnation proceeding, notwithstanding the City's representations to the special commissioners that the parties would try the claim in the instant lawsuit. Although res judicata would normally bar Joleewu's claim, the City is equitably estopped to assert that defense.

A. *Res Judicata*

[1] Under full faith and credit principles, every court within the United States, federal and state, must give the same effect to the judgment of a state court as would the courts of that state. *See* 28 U.S.C., Section 1738; *Parsons*

Steel, Inc. v. First Ala. Bank, 474 U.S. 518, 523, 106 S.Ct. 768, 771, 88 L.Ed. 2d 877 (1986). Therefore, we look to the law of Texas to determine the preclusive effect of the commissioners' award in condemnation. The Texas Supreme Court has adopted the following formulation of res judicata: "the judgment in the first suit precludes a second action by the parties and their privies not only on matters actually litgated but also on causes of action or defenses which arise out of the same subject matter and which might have been litigated in the first suit." *Texas Water Rights Comm'n v. Crow Iron Works,* 582 S.W.2d 768, 771-72 (Tex. 1979); *see also Gracia v. RC Cola-7-Up Bottling Co.*, 667 S.W.2d 517, 519 (Tex. 1984).[1]

1. Joleewu attempts to forestall the application of res judicata altogether by pointing out that the City's condemnation

action was commenced subsequent to Joleewu's inverse condemnation action. Joleewu cites no case explicitly declining to apply res judicata in such a situation, and we assume that Texas courts would follow the general rule that "a judgment, otherwise entitled to res judicata effect in a pending action, [is not] to be deprived of such effect by the fact that the action in which it was rendered was commenced later than the pending action." *Restatement (Second) of Judgments*, Section 14 comment a (1982); *see also Gresham Park Community Org. v. Howell*, 652 F.2d 1227, 1241 (5th Cir. Unit B Aug. 1981).

The parties agree that Joleewu could have litgated its inverse condemnation claim in the condemnation proceeding before the special commissioners, because that claim arose out of the same subject matter as the City's condemnation of Joleewu's property.[2] Because the claim for precondemnation damages "might have been litigated" in the condemnation

proceeding before the commissioners, the City could normally raise the defense of res judicata in subsequent actions. In this case, however, the City's conduct in litigation precludes it from invoking res judicata.

2. *See Glade v. Dietert,* 156 Tex. 382, 388, 295 S.W.2d 642, 646 (1956) (plaintiffs could recover "in the county court, in the case now pending on appeal from the award of the commissioners, . . . all damages to which they may be entitled, including the diminishment of the land value caused by the [pre-condemnation trespass]"); *Alexander v. City of San Antonio,* 468 S.W. 2d 797,798 (Tex. 1971) (*Glade* held that "damages flowing from a prior trespass on land could be recovered in a suit to condemn the land on which the trespass occurred"); *see also Stewart v. City of Austin*, 744 S.W. 2d 682, 685 (Tex. Ct. App. 1988) (claim that city lacked authority to condemn was barred by res judicata once commissioners' award became final judgment).

B. Equitable Estoppel

[2] Under Texas law, one party may be estopped to assert a legal position against another if that position is inconsistent with a previous one: "Where one takes one position in a judicial proceeding, he cannot later take a plainly inconsistent position in another proceeding." *Washburn v. Associated Indem. Corp.*, 721 S.W.2d 928, 933 (Tex. Ct. App. 1986), *writ refused,* 735 S.W. 2d 243 (Tex. 1987); *see also Moore v. Means,* 549 S.W. 2d 417, 419 (Tex. Civ. App. 1977) (same). [3] Although proceedings before the special commissioners in condemnation are technically "administrative" rather than "judicial," *see Lo-Vaca Gathering Co. v. Gardner,* 566 S.W. 2d 366, 368 (Tex. Civ.App. 1978), we conclude that

representations made to the special commissioners may become the basis of a "prior inconsistent judicial position as that term is used in *Washburn.*

3. Equitable estoppel by inconsistent positions in judicial proceedings is distinguished from the doctrine of "judicial estoppel." the latter does not require reliance and injury, but it must be based upon a statement under oath. *See Long v. Knox,* 155 Tex. 581, 585, 291 S.W.2d 292, 295 (1956); *Washburn*, 721 S.W. 2d at 931-32.

The *Washburn* court grappled with an equitable estoppel issue in the context of a workers' compensation proceeding before the Industrial Accident Board followed by a suit in state district court. The claimants argued that the insurance carrier had taken inconsistent positions in the two different fora. The appellate court found the position

asserted before Board to be a "prior inconsistent judicial position." The court reasoned: "The function of the board is quasi-judicial; its award is entitled to the same faith and credit as the judgment of a court; and it is not subject to judicial attack." 721 S.W.2d at 932 (citing *Moore*, 549 S.W.2d at 418). In these respects, the special commissioners are similar to the Board. The commissioners' award, if not set aside on direct appeal, is entitled to the same faith and credit as the judgment of a court. *See* Tex. Prop. Code Ann., Section 21.061 (Vernon 1984) ("If no party in a condemnation proceeding files timely objections to the findings of the special commissioners, the judge . . . "). "Moreover, as detailed in the margin, both bodies have similar procedural powers, and parties may "appeal" to the courts from the decisions of both bodies.[4]

4. *Compare id.* Section 21.014(c) (Vernon 1984) ("Special commissioners may compel the attendance of witnesses and the production of testimony, administer oaths, and punish for contempt in the same manner as a [District Court].") *and id.* Section 21.018(a) ("A party to a condemnation proceeding may object to the findings of the special commissioners by filing a written statement of the objections and their grounds with the court . . . on or before the first Monday following the 20th day after the [findings are].") *with* Tex.Rev. Civ. Stat. Ann. art 8307, Section 4(c) (Vernon Supp. 1990) ("The Board or any member thereof shall have the power to subpoena witnesses, administer oaths, . . . [and] punish for contempt in the same manner and to the same extent as a District Court may do.") *and id.* art. 8307, Section 5 ("Any interested party who is not willing and does not consent to abide by the final ruling and decision of said Board shall . . . within twenty (20) days after giving [notice] bring suit . . . to set aside said final ruling and decision.").

We note the commissioners also have been painted with the label "quasi-judicial," even if obliquely. *See Texas Elec. Serv. Co. v. Campbell*, 328 S.W.2d 208, 213 (Tex. Civ. App. 1959) (referring to commissioners "sitting . . . in a quasi-judicial capacity as officers of the court") *rev'd on other grounds*, 161 Tex. 77, 336 S.W. 2d 742 (1960).

On the record, the City has taken inconsistent judicial positions. At the hearing to ascertain damages for the City's condemnation of easements across Joleewu's moblie home park, one of the special commissioners inquired about the events before the formal initiation of condemnation proceedings. Counsel for the City interrupted this inquiry:

> At this time I want to admonish the commissioners not to consider, prior to the date of taking, losses by reason of these trailers [being] moved. There is another lawsuit pending. . . .

. . . . . .

> So consequently, I am asking you-all not to consider that, *because that is going to be taken care of by negotiations or by trial in that particular lawsuit.*

R. 168-69 (emphasis added). The City specifically represented to the special commissioners that the parties would not be contesting pre-condemnation damages before their tribunal and that the award of the commissioners consequently would not include such damages. In terms of res judicata, the City essentially represented to the court that it would not assert the defense in the other lawsuit between the parties. Yet that is precisely what the City has done.

[3] Equitable estoppel bars the taking of inconsistent positions in judicial proceedings only if two other elements--reliance and injury of the opposing party--are also established. *Washburn*, 721 S.W. 2d at 932. Injury is clearly present: if the City is not estopped to claim that Joleewu's inverse condemnation claim is barred by res judicata, Joleewu will lose the opportunity to recover the $24,640 in pre-condemnation damages it allegedly suffered at the hand of the City.

Reliance is also established on this record. When the City explained to the special commissioners that the parties would settle those damage issues or litigate them in another forum, counsel for Joleewu concurred: "And I am in

agreement with [the Assistant City Attorney]." The district court, in dismissing Joleewu's claim, made much of the fact that Joleewu "failed to object at the hearing or timely file objections to the award." These failures to object are not even surprising, let alone culpable. Joleewu did not object at the hearing because it relied on the City's apparent good faith in representing that those damage issues would be litigated in the instant lawsuit; Joleewu did not file objections to the award because it believed, relying on the City's representations, that it would have the opportunity to recover the disputed damages in the instant lawsuit.

[4] Only one barrier might prevent applying equitable estoppel to the City's res judicata--the doctrine that "estoppel

does not [as a rule] apply against a unit of governmental functions." *Clear Lake City Water Auth. v. Winograd,* 695 S.W. 2d 632, 640 (Tex.Ct.App. 1985) (citing *City of Hutchins v. Prasifka,* 450 S.W.2d 829, 835 (Tex. 1970)). This doctrine has a well-established exception, however: "a municipal or quasi-municipal corporation may be estopped, where justice, honesty, and fair dealing require it." *Id.* (citing cases). Justice, honesty, and fair dealing require estoppel in this case. By its representations, the City induced Joleewu not to present evidence of pre-condemnation damages and induced the commissioners not to award such damages. Whether intentionally or negligently, the City then abandoned these representations in an attempt to take advantage of Joleewu in federal court. As we suggested at oral argument,

this borders on sanctionable conduct; it certainly bears no resemblance to fair dealing.

The City has asserted--in a manner devoid of justice, honesty, and fair dealing-- inconsistent judicial positions. Joleewu relied on the prior position to its injury. Therefore, the City is equitably estopped to raise the defense of res judicata to Joleewu's inverse condemnation claim for damages. The judgment dismissing this claim is reversed, and the claim is remanded for trial.

III.
OTHER CLAIMS

The district court also dismissed Joleewu's state-law claims for fraud in a real estate transaction, breach of

contract, and promissory estoppel. Because these claims are barred by the doctrine of governmental immunity under Texas law, we affirm the dismissal.

A. Fraud in a Real Estate Transaction

[5] Joleewu alleged that the City is liable under Tex.Bus. & Com. Code Ann., Section 27.01 (Vernon 1987) for damages arising from "fraud in a real estate transaction," because it falsely represented that if Joleewu would relocate its mobile home tenants, the City would initiate condemnation proceedings without delay. Even if, as Joleewu asserts, the City of Austin is a "person" within the meaning of the statute, the City is immune from liability for fraud in this case. The rule of municipal immunity in Texas distinguishes between

proprietary and governmental functions:

> A city is liable for torts committed by its employees when the city is performing a proprietary function. On the other hand, a city is immune from liability for torts committed by its employees when the city is performing a governmental function unless the state by statute has waived immunity.

City of Roundrock v. Smith, 687 S.W.2d 300, 302 (Tex. 1985).[5] By judicial interpretation and more recently by statute, the acquisition of land for a public purpose is a governmental function. *See Leeco Oil & Gas Co. v. Nueces County,* 736 S.W.2d 629, 630 (Tex. 1987); Tex. Civ. Prac. & Rem. Code Ann., Section 101.021(a)(3), (9), (22), (32) (Vernon 1986). The City's allegedly fraudulent actions

arose from the acquistion of Joleewu's land for public improvements. Thus, the City is immune from liability for fraud.

5. The Texas Tort Claims Act, which waives municipal immunity for injuries arising from the operation or use of motor vehicles and from the condition or use of tangible personal or real property, obviously does not apply here. *See* Tex. Civ. Prac. & Rem. Code Ann., Section 101.021 (Vernon 1986).

B. Breach of Contract

[6] Joleewu also asserts a breach of contract claim against the City for the same representations. The City is immune to this claim, however, for "a contract in derogation of the municipality's governmental function is unenforceable." *City of Farmers Branch v. City of Addison,* 694 S.W.2d 94, 95 (Tex. Ct. App. 1985). If the acquisition of land for a public purpose is a governmental

function, so is the decision about the timing of the acquisition. A contract restricting a city's freedom in choosing *when* to acquire property is thus a contract in derogation of that function. *See also Clear Lake City Water Auth. v. Clear Lake Utils. Co.*, 549 S.W.2d 385, 391 (Tex. 1977) (municipal authority "could not, by contract or otherwise, bind itself in such a way as to restrict [the] free exercise of [its] governmental powers"); *Cibolo Creek Mun. Auth. v. City of Universal City*, 568 S.W.2d 699, 702 (Tex. Civ. App.1978) ("municipal entity cannot . . . legally enter into any contract which will embarrass or control its legislative powers or duties"). Any contract between the City and Joleewu that purported to dictate when the City must initiate condemnation proceedings is unenforceable. The district court

properly dismissed Joleewu's claim.

C. Promissory Estoppel

Joleewu finally seeks damages for these very same actions of the City under a theory of promissory estoppel. Because Joleewu abandoned this theory at oral argument, we affirm the dismissal of this claim.

IV.

For the foregoing reasons, the judgment of the district court dismissing Joleewu's complaint is reversed and remanded as to the inverse condemnation claim and affirmed as to all other claims.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Adm. Office, U.S. Court--West Publishing Company, Saint Paul, Minn.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 90-8149

JOLEEWU, LTD.,

Plaintiff-Appellant,

versus

CITY OF AUSTIN,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING

(November 29, 1990)

Before JONES, DUHE and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

EDITH H. JONES
United States Circuit Judge

November 26, 1990